

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANTHONY BOTEILHO

Plaintiff,

v.

CHRISTINE GREGOIRE, *et al.*,

Defendants.

Case No. C09-5407BHS/JRC

REPORT AND RECOMMENDATION
TO TRANSFER THIS ACTION TO THE
UNITED STATES DISTRICT COURT
FOR ARIZONA AT TUCSON

NOTED FOR: July 2, 2009

This Civil Rights Action filed pursuant to 42 U.S.C. § 1983 has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and (B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4.

Before the court are a number of motions. Defendants ask that this action either be dismissed or transferred to Arizona (Dkt. # 25). Plaintiff asks that the proceedings be stayed pending a decision by the Washington State Supreme Court regarding his underlying conviction (Dkt # 42). Finally, defendants ask for a one-day extension to reply regarding the motion to dismiss or transfer (Dkt. # 49).

REPORT AND RECOMMENDATION- 1

1 Defendant's motion for a one-day extension of time to file a reply is GRANTED.
2 Plaintiff's motion to stay this action is DENIED as plaintiff's underlying conviction is not
3 relevant to these proceedings. The motion to dismiss or transfer the case is a dispositive motion
4 requiring the following Report and Recommendation.

5 FACTS

6 Plaintiff was convicted of a crime in a Washington State Superior Court. On March 3,
7 2006, he was transferred from the Airway Heights Correctional Center in Eastern Washington to
8 a private prison in Eloy Arizona -- the Eloy Detention Center. After transfer to another private
9 prison in Eloy -- Red Rock Corrections Center -- he was attacked by inmates.
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11 Plaintiff alleges that he was severely injured in the attack and that he did not receive
12 adequate medical health care at either Arizona facility. He also claims that when he was
13 returned to Washington he received inadequate care at the Airway Heights Corrections Center
14 (Dkt. # 10, amended complaint).
15

16 He also claims that his placement in the Florence Corrections Center was retaliatory,
17 improper, and violated his right to practice religion and right of access to courts. He names
18 several Washington defendants, as well as the persons in charge of the private facilities in
19 Arizona. He brings the action pursuant to 42 U.S.C. 1983, but also raises Arizona and
20 Washington tort claims.
21

22 The plaintiff is now housed in Western Washington at the Monroe Complex- Twin
23 Rivers Corrections Center.

24 After careful review of the record and the allegations in the amended complaint, this
25 court concludes that the nexus for this action is the Red Rock Correctional Center in Eloy
26 Arizona, where plaintiff was allegedly attacked, and the Florence Correctional Center in Eloy

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1 Arizona, where he was placed in segregation and received medical treatment. Eloy Arizona is in
2 Pinal County. The United States District Court for Arizona at Tucson would be the most likely
3 location to hear a case arising out of that county.

4 DISCUSSION

5 A. *Motion to dismiss.*

6 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) provides that a court should
7 dismiss a claim under Fed. R. Civ. P. 12(b)(6) either because of the lack of a cognizable legal
8 theory or because of the absence of sufficient facts alleged under a cognizable legal theory.
9 Balistreri v. Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990).

11 For purposes of ruling on this motion, material allegations in the complaint are taken as
12 admitted and the complaint is construed in the plaintiff's favor. Keniston v. Roberts, 717 F.2d
13 1295 (9th Cir. 1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not
14 need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement
15 to relief requires more than labels and conclusions, and a formulaic recitation of the elements of
16 a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955,
17 1964-65 (2007)(internal citations omitted). "Factual allegations must be enough to raise a right
18 to relief above the speculative level, on the assumption that all the allegations in the complaint
19 are true (even if doubtful in fact)." Id. at 1965. Plaintiffs must allege "enough facts to state a
20 claim to relief that is plausible on its face." Id. at 1974.

22 As a motion to dismiss, the pleading filed by defendants is inadequate. Defendants make
23 conclusory statements about enjoying immunity, but the defendants do not clearly raise that
24 affirmative defense by informing the court what type of immunity the defendants claim applies.
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1 Defendants make, in a conclusory fashion, the argument that plaintiff fails to allege any facts
2 stating a claim against Washington defendants. Defendants state:

3 While Plaintiff's claims are not entirely clear, it is evident that none of the
4 events giving rise to his claims occurred in Washington. Further, although
5 Plaintiff names Washington Defendants, including the Governor and various
6 Washington Department of Corrections Officials, the remaining Defendants are
7 non-residents. More importantly, Plaintiff fails to allege any facts stating a claim
8 against the Washington Defendants – most of whom, enjoy immunity. Indeed,
9 Plaintiff complains of an incident that purportedly occurred in Arizona over four
10 years ago. Nowhere in his complaint does he allege that the Washington
11 Defendants were personally involved in the purported deprivations Plaintiff is
12 complaining about in this § 1983 action. Accordingly, venue is not appropriate in
13 this district. 28 U.S.C. § 1391(b).

14 (Dkt. # 25, page 3-4).

15 Plaintiff alleges there was a contract between the State of Washington and the
16 corporation running private prisons in Arizona, and that Governor Gregoire was in charge of
17 appointing and monitoring the persons who entered into that contract. He sues other officials for
18 their acts or omissions in inmate medical care, inmate classification, inmate movement including
19 out-of-state contract placement. He also names Washington Department of Corrections
20 employees who were allegedly on site in Arizona monitoring compliance with the contracts (Dkt.
21 # 10, page 4).

22 Plaintiff makes clear in his opposition to the motion to dismiss or transfer that the
23 contract is part of this action (Dkt. # 44). Plaintiff also raises a claim about the medical care he
24 received when he returned to Washington. That medical care was given while he was housed at
25 the Airway Heights Corrections Center in Spokane. The court cannot say plaintiff has failed to
26 state a claim and concludes that dismissal at this stage, based on this motion, would be improper.
The motion to dismiss should be DENIED.

1 B. *Transfer.*

2 A District Court is authorized under 28 U.S.C. § 1404(a) to transfer an action “for the
3 convenience of the parties and witnesses, in the interest of justice.” The court considers three
4 factors. The factors are: (1) convenience of the parties; (2) convenience of the witnesses; and (3)
5 the interest of justice. Grubs v. Consolidated Freightways, Inc., 189 F. Supp. 404 (D.C. Mont.).
6 The burden of proving that a transfer is proper is on the moving party.
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8 All defendants move for transfer and argue:

9 Because all of the alleged injuries occurred in Arizona, the witnesses reside in
10 Arizona, and Arizona law will apply to any of Plaintiff’s state law tort claims,
11 venue is not appropriate in this Court and this case should be dismissed.
12 Alternatively, this action should be transferred to Arizona for both legal and
13 convenience purposes.

14 (Dkt. # 25, pages 2-3).

15 The court gives weight to plaintiff’s choice in filing the action in the Western District of
16 Washington and notes that several of the Washington defendants are government employees who
17 work in Thurston County. However, the alleged assault that gives rise to the majority of the
18 claims in this action occurred in Arizona. Evidence, such as medical records and witnesses to
19 the assault and conditions in the private prisons, are in Arizona. Although plaintiff maintains
20 150 inmates have been returned from Arizona to Washington, he does not provide any details
21 about these inmates being witnesses (Dkt. # 44).

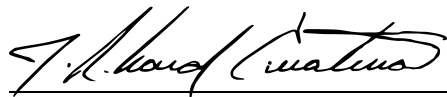
22 The decision to place plaintiff in segregation was made while he was housed in the
23 Florence Corrections Center in Arizona. In fact, the only claims that allegedly occurred in
24 Washington occurred at the Airway Heights Corrections Center in Spokane, which is outside the
25 Western District of Washington and located in the Eastern District of Washington. Therefore,
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1 witnesses are not most likely to be found in the Western District, but rather indicate that the
2 District of Arizona is the proper place for the majority of this action.

3 Both the convenience to the parties and witnesses and the interest of justice militate
4 toward transfer of this action. The proper venue for this action is the United States District Court
5 in Tucson, Arizona. The address for that court is 405 West Congress Street, Tucson, Arizona,
6 85701-5098. Defendant's motion to transfer the action should be GRANTED.

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8 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
9 Procedure, the parties shall have fourteen (14) days from service of this Report to file written
10 objections. See also Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those
11 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the
12 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on July
13 2, 2010, as noted in the caption.

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15 Dated this 8th day of June, 2010.

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18 J. Richard Creatura
19 United States Magistrate Judge
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